ECORD
AND
BRIEFS

Supreme Court
FILED
NOV 21 201
OFFICE OF THE

No. 15-1256

In the Supreme Court of the United States

SHANNON NELSON *and* LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

BARBARA BERGMAN
NACDL Amicus Committee Co-Chair
James E. Rogers College of Law
The University of Arizona
1201 E. Speedway Blvd
P.O. Box 210176
Tucson, AZ 85721-0176
(520) 621-3984

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

Counsel for Amicus Curiae

TABLE OF CONTENTS

Table of Authorities ii
Interest of the *Amicus Curiae* 1
Summary of Argument 2
Argument 4
Colorado's extraordinary requirements for the return of monetary exactions violate due process. 4
A. The Colorado statute is inconsistent with the common-law practice of restoring exactions imposed upon conviction when the conviction is later invalidated 4
1. The principle that financial exactions are returned upon invalidation of a conviction was recognized in medieval and early common law. 5
2. Eighteenth- and nineteenth-century courts continued to return the defendant's property upon invalidation of his conviction. 11
3. Most States today provide for automatic return of monetary exactions upon reversal of the conviction permitting imposition of the exactions 15
4. Colorado's deviation from these longstanding principles violates due process. 19
B. Under the decision below, criminal defendants whose convictions are reversed would be in a worse position than taxpayers subjected to an unlawful tax 20

C. The Colorado law's imposition of different procedural burdens on similarly-situated defendants confirms its unconstitutionality. 24

Conclusion 26

TABLE OF AUTHORITIES

Cases

Addington v. *Texas*,
441 U.S. 418 (1979) 22

Am. Trucking Associations, Inc. v. *Smith*,
496 U.S. 167 (1990) 23

Arkadelphia Milling Co. v. *St. Louis Sw. Railway Co.*,
249 U.S. 134 (1919) 13

Atchison, Topeka & Santa Fe R. Co. v. *O'Connor*,
223 U.S. 280 (1912) 20

Bank of the United States v. *Bank of Wash.*,
31 U.S. 8 (1832) 13

Berea v. *Moorer*,
55 N.E.3d 1186 (Ohio 2016) 16

Buzz Barton & Associates, Inc. v. *Giannone*,
483 N.E.2d 1271 (Ill. 1985) 14

Carpenter v. *Shaw*,
280 U.S. 363 (1930) 20

Com. v. *McKee*,
38 A.3d 879 (2012) 17

Fair Assessment in Real Estate Ass'n v. *McNary*,
454 U.S. 103 (1981) 23

even in the seventeenth century." Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America, in Drugs, Crime & Social Policy* 109 (Thomas Mieczkowski ed., 1991). Following this trend, forfeiture and corruption of blood were rejected by the Framers as penalties for treason and by the First Congress as penalties for all federal crimes. U.S. Const. Art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."); Act of April 20, 1790, ch. 9, § 24, 1 Stat. 117 (1790) ("[N]o conviction or judgment * * * shall work corruption of blood or any forfeiture of estate."), repealed as to offenses occurring after Nov. 1, 1987 by Pub. L. No. 98-473, 98 Stat. 1987, 2031 (1984).

For these reasons—and perhaps also because the principle requiring restoration of property upon reversal of a conviction was so well accepted as not to arise in court proceedings—there are few cases from the late eighteenth and nineteenth centuries addressing the issue. But see *Stromburg* v. *Earick*, 45 Ky. 578, 582 (1846) (ordering a recalcitrant Justice of the Peace to refund a fine paid when the Justice had lacked jurisdiction over the case).

But the recognition of the principle by Blackstone and other influential treatise-writers would have been familiar and persuasive to early American courts:

- "[I]f the King grant over the Lands of a Person outlawed for Treason or Felony, and afterwards the Outlawry be reversed, the Party may enter on the Patentee, and needs neither to sue a Petition to the King, nor a Scire facias against the patentee." 2 Hawkins, *A Treatise of Pleas of the Crown* 655 (John Curwood, ed., 8th ed. 1824).

Cases—continued

Rinaldi v. *Yeager*,
384 U.S. 305 (1966) 3, 24, 25

Scott v. *Jones*,
84 N.W. 479 (N.D. 1900) 16

State v. *Gallagher*,
955 P.2d 1371 (Mont. 1998) 16

State v. *Moser*,
111 P.3d 54 (Haw. Ct. App. 2005) 15

State v. *Perwin*,
342 A.2d 178 (1975) 16

State v. *Piekkola*,
241 N.W.2d 563 (S.D. 1976) 16

State v. *Stein*,
806 P.2d 346 (Alaska Ct. App. 1991) 15

State v. *Wilbur*,
450 S.W.2d 458 (Mo. Ct. App. 1970) 16

Stromburg v. *Earick*,
45 Ky. 578 (1846) 12

Telink, Inc. v. *United States*,
24 F.3d 42 (9th Cir. 1994) 16

Toland v. *Strohl*,
364 P.2d 588 (1961) 16

Toth v. *State*,
901 A.2d 820 (Md. 2006) 15

United States v. *Lewis*,
478 F.2d 835 (5th Cir. 1973) 16

United States v. *Morgan*,
307 U.S. 183 (1939) 14

Ward v. *Bd. of Cty. Comm'rs*,
253 U.S. 17 (1920) 21

Cases—continued

Weiss v. *United States*,
510 U.S. 163 (1994) 5

Wood v. *State*,
999 N.E.2d 1054 (Ind. Ct. App. 2013) 15

Statutes, Rules, Regulations, & Constitutions

28 U.S.C. § 1341 23

Alaska Stat. Ann. § 12.55.185 17

Ark. Admin. Code 004.00.3-39 18

Ark. Code Ann. § 16-96-509 16

Ark. Const. art. III, § 2 17

Cal. Penal Code § 1262 16

Colo. Rev. Stat. Ann.
§ 16-22-113 18
§ 13-65-102(1)(a) 25

Colo. Const. art. VII, § 10 17

Colo. R. Crim. Pro. 29(c) 25

Del. Const. art. V, § 2 17

Ga. Const. art. II, § 1, para. III 17

Idaho Const. art. VI, § 3 17

Ill. Admin. Code tit. 20, § 1285.70 18

Kan. Admin. Regs. 30-46-17 18

Mass. R. Crim. P. 31 17

Conn. Gen. Stat. Ann.
§ 9-46a 17
§ 54-250 18

D.C. Code Ann. § 22-4001 18

Del. Code tit. 11 § 4103(a) 16

Statutes, Rules, Regulations, & Constitutions—continued

Fla. Stat. Ann. § 943.059 (West 2016) 18
Haw. Rev. Stat. Ann. § 831-2 17
Ill. Comp. Stat. Ann. 5/5-5-5 18
Ind. Code Ann. § 3-7-13-5 18
Kan. Stat. Ann. § 22-4902 18
La. Stat. Ann. § 18:102 18
Mass. Gen. Laws Ann. ch. 51, § 1 18
Md. Code Ann., Crim. Proc. § 11-613 17
Md. Code Ann., Elec. Law § 3-102 18
Me. Rev. Stat. tit. 17-A § 1303-A 16
Me. Rev. Stat. tit. 34-A, § 11225-A 18
Mich. Comp. Laws Ann. § 168.758b 18
Minn. Stat. Ann. § 609.165 18
Miss. Admin. Code 31-2:6.1 18
Miss. Code Ann.
§ 45-33-47 18
§ 99-19-73(12) 16
Mo. Ann. Stat.
§ 561.026 18
§ 589.400(3) 18
Mont. Code Ann.
§ 46-18-801 18
§ 46-20-204 17
§ 46-20-707 17
§ 46-23-510 18
14B N.C. Admin. Code 18B.0501 18
N.C. Gen. Stat. Ann. § 14-208.6C 18
N.D. Admin. Code 10-13-11-01 18

Statutes, Rules, Regulations, & Constitutions—continued

N.H. Rev. Stat. Ann. § 607-A:2 18

N.J. Stat. Ann.
§ 2A:166-13 16
§ 19:4-1 18

N.M. Stat. Ann. § 31-13-1 18

N.Y. Correct. Law § 168-f 18

N.Y. Elec. Law § 5-106 18

N.Y. Penal Law § 60.35(4) 16

Nev. Rev. Stat. Ann.
§ 177.115 17
§ 213.157 18

Ohio Rev. Code Ann. § 2961.01 18

Okla. Stat. Ann. tit. 26, § 4-101 18

Or. Rev. Stat. Ann.
§ 137.281 18
§ 163A.015 18

Pa. R.A.P. 2591 17

234 Pa. Code § 320 18

S.C. Code Ann.
§ 7-5-120 18
§ 18-1-140 16
§ 23-3-430 18

S.C. Code Ann. Regs. 73-26 18

S.D. Codified Laws
§ 12-4-18 18
§ 23A-33-4 17

Tenn. Code Ann. § 2-2-139 18

Tenn. Comp. R. & Regs. 1395-01-01-.07 18

Statutes, Rules, Regulations, & Constitutions—continued

Tex. Const. art. VI, § 1 17
Tex. Code Crim. Proc. art. 103.008 17
U.S. Const. Art. III, § 3, cl. 2 12
Utah Code Ann. § 20A-2-101.5 18
Utah R. Crim. P. 28 17
Va. Code Ann. § 53.1-231.2 18
19 Va. Admin. Code 30-170-30 18
W. Va. Code Ann. § 62-7-1 17
Wash. Rev. Code Ann. § 10.01.160 17
Wash. Admin. Code 446-16-025 18
Wash. R. App. P. 12.8 17
Wis. Stat. Ann. § 304.078 18
Wyo. Stat. Ann. § 7-1-103 17

Other Authorities

Arthur's Case (1696) 91 Eng. Rep. 425; 2 Salk. 495 (K.B. 8
Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America, in Drugs, Crime & Social Policy* 109 (Thomas Mieczkowski ed., 1991) 12
2 Hawkins, *A Treatise of Pleas of the Crown* 655 (John Curwood, ed., 8th ed. 1824) 12
2 Matthew Hale, *Historia Placitorum Coronae* 198-209 (1736) 6
A Practical Treatise on the Criminal Law (1816) 6, 8, 9, 13

Other Authorities—continued

A Practical Treatise on the Criminal Law (1st Am. ed. 1832) 9

Restatement (Third) of Restitution and Unjust Enrichment (Am. Law Inst. 2011) 14

Theron Metcalf, *The Reports of Sir Henry Yelverton* 180-180a n.2 (1820) 7

Thomson Reuters, *Expungement of Criminal Records*, 0030 Surveys 20 (October 2015) 18

4 William Blackstone, *Commentaries* ..... *passim*

2 William Hawkins, *A Treatise of the Pleas of the Crown* (1806) 11

2 William Hawkins, *A Treatise of the Pleas of the Crown* (John Curwood ed., 8th ed. 1824) 8

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and with its affiliates represents more than 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the just, proper, and efficient administration of justice. It frequently appears as an *amicus curiae* before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case. The question whether due process permits States to impose procedural burdens on defendants seeking the return of financial exactions after their convictions have been invalidated—when the exactions were based entirely on the now-invalid criminal convictions—is an issue of great importance to individuals improperly convicted of criminal offenses.[1]

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this *amicus* brief have been filed with the Clerk.

SUMMARY OF ARGUMENT

What procedures may a State require an exonerated criminal defendant to satisfy before the State is obligated to return monetary exactions collected on the authority of the since-invalidated conviction?

Colorado's Exoneration Act, Colo. Rev. Stat. §§ 13-65-101 to 13-65-103, as interpreted by the Colorado Supreme Court in this case, requires a defendant to:

- institute a separate civil proceeding; and
- prove his or her factual innocence by clear and convincing evidence.

Pet. App. 1a-16a. These extraordinary requirements violate the Due Process Clause of the Fourteenth Amendment.

This Court has frequently recognized the importance of history to the due process inquiry, and in this case the history is dispositive. The right to restoration of monetary exactions attendant to a subsequently-invalidated criminal conviction dates back more than six hundred years.

From the Middle Ages until the American Revolution, courts consistently required the Crown to return a criminal defendant's property if the criminal judgment against him was reversed. Blackstone and other treatise writers recognized that this norm remained in force in the eighteenth and nineteenth centuries.

Most States have incorporated this principle into common law or statutory standards governing the return of funds obtained on the authority of a criminal conviction that is later set aside. Indeed, this principle applies in civil contexts as well—as reflected in decisions of this Court requiring the return of funds

obtained as a result of a later-overturned civil judgment.

While States have great leeway in our federal system to establish their own procedures, they may not do so in a way that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445 (1992) (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)). The Due Process Clause requires Colorado to permit the return of funds exacted on the basis of a subsequently-invalidated conviction without burdensome procedural requirements.

Moreover, the holding below produces a highly anomalous result. In the tax context, for example, individuals are entitled to clear and certain refunds when the tax has been proven unlawful. Criminal defendants seeking relief from exactions based on an invalid conviction are entitled to at least the same due process protection as taxpayers burdened by an unlawful tax.

The Colorado statute also differentiates between similarly situated criminal defendants in two impermissible ways. *First*, the statute's evidentiary burden applies only to defendants who were incarcerated. It does not provide relief for individuals who were sentenced to fines without incarceration. Distinguishing classes of criminal defendants in this way violates this Court's holding in *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966), which prevents states from differentiating between similarly situated defendants based on incarceration. *Second*, the Act distinguishes between defendants whose jury verdicts have been overridden for insufficiency of the evidence based on whether the trial judge or the appellate judge made the

ruling. Neither distinction is reasonable, and both violate Colorado defendants' rights.

For all of these reasons, this Court should reverse the judgment of the Colorado Supreme Court and hold that a State may not impose anything more than minimal procedures on the refund of exactions based on a subsequently-invalidated conviction.

ARGUMENT

COLORADO'S EXTRAORDINARY REQUIREMENTS FOR THE RETURN OF MONETARY EXACTIONS VIOLATE DUE PROCESS.

Colorado's procedure for the recovery of funds exacted on the basis of a subsequently-invalidated conviction is unconstitutional, as demonstrated by history, a comparison with the due process requirements for refunds of unconstitutionally-exacted taxes, and the irrational distinctions drawn by Colorado's law.

A. The Colorado statute is inconsistent with the common-law practice of restoring exactions imposed upon conviction when the conviction is later invalidated.

Grounded in both British and colonial history, the Fourteenth Amendment's due process guarantee preserves legal rights that "[t]hose who had been driven from the mother country by oppression and persecution brought with them, as their inheritance." *Hurtado* v. *California*, 110 U.S. 516, 539 (1884).

History therefore plays an important role in determining the contours of due process. Indeed, the Court has recognized that an important question in assessing whether a criminal law procedure violates due process is whether "'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505

U.S. at 445 (quoting *Patterson*, 432 U.S. at 202). "Historical practice is probative of whether a procedural rule can be characterized as fundamental." *Id.* at 446; see also *Weiss* v. *United States*, 510 U.S. 163, 199 (1994) (Scalia, J., concurring) (describing the inquiry into history as "utterly conclusive").

Across centuries of early British, colonial, and American history, courts have recognized that when the underlying conviction is invalidated, formerly convicted individuals must be restored to the status quo ante with respect to any monetary exactions imposed on the basis of the since-invalidated conviction. Traditionally, that occurred without additional process and regardless of the reasons for the conviction's invalidity.

The decision below departs from this longstanding principle. Rather than returning to petitioners the money exacted on the basis of their convictions, the Colorado Supreme Court left petitioners with no recourse other than that provided by the Colorado Exoneration Act. That measure requires a defendant who has been imprisoned to institute separate proceedings and prove his or her actual innocence in order to regain the exacted funds. Those proceedings are onerous and violate due process.

1. *The principle that financial exactions are returned upon invalidation of a conviction was recognized in medieval and early common law.*

During the Middle Ages, the primary punishment for major offenses—treasons and felonies—was death. Defendants were typically executed soon after sentence was imposed and therefore rarely lived to see their convictions reversed. But a criminal defendant also faced the financial penalties of "attainder," typically

including "forfeiture" and "corruption of blood." In general, the monarch took the defendant's personal property, his feudal lord took any lands, and his heirs could not trace any inheritance through him. 4 William Blackstone, *Commentaries* *373-*379. Because these sanctions inflicted financial punishments on the defendants' heirs, courts came to allow heirs to bring writs of error. Joseph Chitty, *A Practical Treatise on the Criminal Law* 747 (1816).

Writs of error were also awarded to reverse a different type of criminal judgment—outlawry. Like a default judgment, a judgment of outlawry was entered when the sheriff, obeying a writ of exigent, called out the name of the accused from the courthouse steps on a specified number of occasions, and the defendant failed to answer the summons. See generally 2 Matthew Hale, *Historia Placitorum Coronae* 198-209 (1736). Like a convict, the outlaw was subject to forfeiture and corruption of blood—but unlike the convict, he frequently lived to challenge the judgment against him. Joseph Chitty, *A Practical Treatise on the Criminal Law* 744 (1816) ("The greatest number of cases in which judgment has been thus reversed are those of outlawry.") Indeed, because an outlaw had not yet presented a defense, and because "reversal of [outlawry] only causes an inquiry into the substantial merits of the case [*i.e.*, a trial], the courts [we]re always inclined to reverse it," even for "trifling objections." *Id.* at 752.

If a defendant's judgment (whether one of conviction or outlawry) was reversed on a writ of error, courts required the sovereign to return any monetary exactions imposed as a consequence of the reversed judgment. Minimal, if any, additional process was required to secure the return of funds or land. As

Blackstone explained, "when judgment, pronounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside, *and the party stands as if he had never been at all accused*; restored in his credit, his capacity, his blood, and his estates." 4 William Blackstone, *Commentaries* *386 (emphasis added). Sir Henry Yelverton, a justice in the Court of Common Pleas, agreed: "So if a termor for years is outlawed, he shall be restored to the term, on reversal of the outlawry, though it has been sold by the king." Theron Metcalf, *The Reports of Sir Henry Yelverton* 180-180a n.2 (1820).

These principles were reflected in early common law decisions. For example, in a 1407 King's Bench case, the Crown had imposed criminal penalties upon the defendant without following the required procedures. The Escheator had found that the defendant had committed treason, and the Crown took his property. But because the Escheator had proceeded "by inquest of office without indictment" and the defendant had been denied his right to indictment by a grand jury, the Escheator's finding of a criminal violation was invalidated. YB 8 Hen. 4, fol. 21b, Pasch., pl. 3 (K.B. 1407), translated at perma.cc/B2N2-R8EB [hereinafter *1407 Case*]. The court ordered the Crown to return the defendant's possessions: "Until indictment for treason and attaint by course of law, the accused traitor forfeited nothing." *Ibid.*

Another early case demonstrates that return of property followed upon reversal of a criminal judgment: "Plaintiff executors brought Error to reverse an outlawry pronounced on their testator. The outlawry was reversed at their suit. Plaintiff executors were restored their testator's goods." YB 11 Henry 4, fol. 65b, Pasch., pl. 22 (Eng. 1410), translated at perma.cc/-

249C-7N33 [hereinafter *1410 Case*]. The Court of Queen's Bench gave the rationale for this rule two centuries later: Monetary penalties had to be returned because a reversal makes "it is as if no outlawry had been." *Ogdell's Case* (1592) 78 Eng. Rep. 526, 526; 34 Cro. Eliz. 270, 271 (Q.B.); see also *Eyre* v. *Woodfine* (1592) 78 Eng. Rep. 533, 533; 34 Cro. Eliz. 278, 278-279 (Q.B.) (returning outlaw's property after reversed judgment).

Thus, when a defendant or his heirs won a reversal of a criminal judgment, the return of his property required no additional process. Following the reversal of a judgment of conviction or outlawry, "the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseisor" with no more. 4 William Blackstone, *Commentaries* *386; accord Joseph Chitty, *A Practical Treatise on the Criminal Law* 756 (1816).[2]

---

[2] Process was required in one rare set of circumstances: when the crime was not high treason and the defendant owned lands. In such a case, because the lands had been forfeited to the defendant's feudal lord rather than to the Crown, the lord was entitled to notice and an opportunity to be heard. The required procedure—*scire facias*—was for the annulment of the conveyance records. Joseph Chitty, *A Practical Treatise on the Criminal Law* 755 (1816). It is not apparent on what ground, if any, a lord responding to a writ of *scire facias* could have successfully objected and retained the defendant's land. See *Arthur's Case* (1696) 91 Eng. Rep. 425; 2 Salk. 495 (K.B.) (an outlaw having produced writs of error reversing the judgments of outlawry, the court held that "[i]f there be lands, there must be a scire facias against the lords, mediate and immediate, to shew [sic] cause why [the criminal defendant] should not have restitution."); accord 2 William Hawkins, *A Treatise of the Pleas of the Crown* 654 (John Curwood ed., 8th ed. 1824). As Blackstone recognized, this right to the writ of *scire facias* stemmed from the feudal relationship,

Importantly, this common law rule providing for automatic return of property applied even if the grounds for invalidating the criminal judgment were unrelated to guilt or innocence. In *1407 Case*, for example, the conviction was reversed because proper procedures had not been followed; the reviewing court made no inquiry into the defendant's actual guilt or innocence. But the ruling recognized that a monetary sanction imposed on the basis of conviction could not stand when the judgment was invalidated. And in *1410 Case*, the defendant's outlawry was reversed without consideration of the merits of the underlying charges.

Indeed, reversals of criminal judgments in this era frequently rested on facts unrelated to guilt or innocence. Convictions for breaching the King's peace would be reversed if the indictment specified the wrong King (for example, because of an intervening royal death). Judgments of outlawry were invalid if a sheriff used the phrase "at my county court" instead of "at my county court of Middlesex." And when a sentence of execution for high treason stated that the defendant's entrails were to be taken from his body and burned, but failed to specify that they were to be burned "in his sight," "he being alive," the conviction was to be reversed. 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 752-753 (1st Amer. ed. 1832).

No matter the grounds for reversal, "[t]he effect of the reversal of the attainder [was] to restore the party to all the capacities which he had lost, and to all the

---

which did not follow the colonies' early settlers as an element of American common law. 4 William Blackstone, *Commentaries* *379 ("[T]he land would naturally have descended to the heir, * * * did not it's feodal [sic] quality intercept such descent, and give it by way of escheat to the lord.").

honours, fortunes and estates which he had forfeited." *Id.* at 755; accord 4 William Blackstone, *Commentaries* *386.

Finally, courts consistently held that defendants were entitled to the return of their property, even if (as was often the case) the Crown in the interim had given or sold the defendant's property to an innocent third party. In *Eyre* v. *Woodfine*, *supra*, for example, a tenant had been outlawed and, upon his outlawry, his tenancy was forfeit to the Crown. The Queen sold his tenancy to an apparently unrelated third party. But the defendant's outlawry was subsequently reversed. The Court of Queen's Bench held that the tenant would be restored to his tenancy.

One justice expressed concern that, although leaving the former outlaw with nothing would be unfair, the bona fide purchaser also had an interest worth protecting. Despite this justice's concerns, the court ruled for the former outlaw:

> [T]he termor shall have again his term, and not the money for which it was sold; and in whosesoever hands the lands came, and by whatsoever consideration, the party shall be restored; for the outlawry being reversed, it is as if there were no record, and the Queen's interest was but conditional, viz. it is good if the outlawry be good; and therefore the term being sold, it is tied with the condition into whomsoever hands it cometh, that if the outlawry be reversed, the term is reduced to the owner.

78 Eng. Rep. at 533. The court held that the purchaser had bought the tenancy subject to the implicit condition that he return it if the Queen's title was defective. *Ibid.*

Eyre was not an outlier. In *Ognell's Case, supra*, a tenant who had been outlawed assigned his lease to the plaintiff. The plaintiff-assignee was put out of possession by one J.S., apparently because the Queen sold the lease to J.S. after the outlawry. The outlawry was reversed, and the plaintiff-assignee sued for the profits J.S. derived from the land from the time the plaintiff was assigned the lease until the time the outlawry was reversed. The defendant objected "that during that time the Queen had the interest, and the assignee had no right." 78 Eng. Rep. 526, Cro. Eliz. 270, 270-271. But the plaintiff-assignee won the case, "for by the reversal it is as if no outlawry had been; and there is no record of it." *Ibid.*

Treatises recognized this longstanding principle that a former outlaw or former convict had a categorical right to possession upon reversal of judgment. Indeed, this right was viewed as so fundamental that the defendant did not owe the new owner any sort of process. Hawkins wrote: "[I]f the King grant over the Lands of a Person outlawed for Treason or Felony, and afterwards the Outlawry be reversed, the Party may enter on the Patentee, and needs neither to sue a Petition to the King, nor a Scire facias against the patentee." 2 William Hawkins, *A Treatise of the Pleas of the Crown* 462 (1806).

2. Eighteenth- and nineteenth-century courts continued to return the defendant's property upon invalidation of his conviction.

Financial exactions tied to criminal convictions were both fewer and smaller in early America. The colonists chafed at, and the colonies and early national government abolished, many forms of financial penalties. "[C]riminal forfeiture and corruption of blood were rarely used as penalties in the American colonies,

even in the seventeenth century." Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America, in Drugs, Crime & Social Policy* 109 (Thomas Mieczkowski ed., 1991). Following this trend, forfeiture and corruption of blood were rejected by the Framers as penalties for treason and by the First Congress as penalties for all federal crimes. U.S. Const. Art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."); Act of April 20, 1790, ch. 9, § 24, 1 Stat. 117 (1790) ("[N]o conviction or judgment * * * shall work corruption of blood or any forfeiture of estate."), repealed as to offenses occurring after Nov. 1, 1987 by Pub. L. No. 98-473, 98 Stat. 1987, 2031 (1984).

For these reasons—and perhaps also because the principle requiring restoration of property upon reversal of a conviction was so well accepted as not to arise in court proceedings—there are few cases from the late eighteenth and nineteenth centuries addressing the issue. But see *Stromburg* v. *Earick*, 45 Ky. 578, 582 (1846) (ordering a recalcitrant Justice of the Peace to refund a fine paid when the Justice had lacked jurisdiction over the case).

But the recognition of the principle by Blackstone and other influential treatise-writers would have been familiar and persuasive to early American courts:

- "[I]f the King grant over the Lands of a Person outlawed for Treason or Felony, and afterwards the Outlawry be reversed, the Party may enter on the Patentee, and needs neither to sue a Petition to the King, nor a Scire facias against the patentee." 2 Hawkins, *A Treatise of Pleas of the Crown* 655 (John Curwood, ed., 8th ed. 1824).

- "The effect of the reversal of the attainder is to restore the party to all the capacities which he had lost, and to all the honours, fortunes and estates which he had forfeited." Jospeh Chitty, *A Practical Treatise on the Criminal Law* 756 (1816).

Indeed, the broad recognition of this principle during the nineteenth century is demonstrated by its application in civil cases. That had been true under early English law. Metcalf, *supra*, at 180-180a & n.2; *Eyre* v. *Woodfine*, Cro. Eliz. 278 (Q.B. 1592) (noting that the norm applied in civil cases, though civil defendants were entitled only to money rather than in-kind restoration of their property). And it was true in nineteenth-century America as well. As this Court explained in 1832, "On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the judgment, to make restitution to the other party for what he has lost." *Bank of the United States* v. *Bank of Wash.*, 31 U.S. 8, 15 (1832).

This power to order restoration to the status quo ante in civil cases was not statutory, nor did it require a separate lawsuit. Rather, the power to require repayment after a reversed judgment is "inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co.* v. *St. Louis Sw. Railway Co.*, 249 U.S. 134, 146 (1919).

Indeed, this Court's opinions did not distinguish between civil and criminal judgments at all:

> [T]he power is inherent in every court, while the subject of controversy is in its custody, and the parties are before it, to undo what it had no

> authority to do originally, and in which it, therefore, acted erroneously, and to restore, so far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal. The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there has been as to the proceedings to enforce the restitution.

Nw. Fuel Co. v. *Brock*, 139 U.S. 216, 219 (1891).

This principal is beyond cavil. See *United States* v. *Morgan*, 307 U.S. 183, 197 (1939) ("What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution."); *Buzz Barton & Associates, Inc.* v. *Giannone*, 483 N.E.2d 1271, 1275 (Ill. 1985) ("It is well established that [o]n reversal of a judgment under which one of the parties has received benefits, he is under an obligation to make restitution * * *."); *Miga* v. *Jensen*, 299 S.W.3d 98, 101 (Tex. 2009) ("Restitution after reversal has long been the rule in Texas and elsewhere."); *Restatement (Third) of Restitution and Unjust Enrichment* § 18 (Am. Law Inst. 2011) ("A transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution as necessary to avoid unjust enrichment.").

3. Most States today provide for automatic return of monetary exactions upon reversal of the conviction permitting imposition of the exactions.

Consistent with these centuries of treatise-writing and case law, at least 27 States today expressly recognize—in common law or statutory provisions—the principle that monetary exactions imposed upon the basis of a criminal conviction must be returned when the conviction is invalidated.

In at least 14 States, this norm is embodied in the common law. For example, the Florida District Court of Appeals has held:

> [T]he respondent trial judge has jurisdiction in this cause * * * to entertain the petitioner's motion herein for the return of a $500 fine, a $350 restitution payment as a probationary condition, and a $90 probation cost payment as a probationary condition (all previously imposed as a penalty by the trial court upon petitioner's conviction for malicious destruction of personal property) as part of its inherent power to correct the effects of its own wrongdoing and restore the petitioner to the status quo ante, following a reversal on appeal of said conviction and remand for a new trial * * *.

Cooper v. *Gordon*, 389 So. 2d 318, 319 (Fla. Dist. Ct. App. 1980). See also *Ex parte McCurley*, 412 So. 2d 1236 (Ala. 1982); *State* v. *Stein*, 806 P.2d 346 (Alaska Ct. App. 1991); *State ex rel. Hanson* v. *Superior Court In & For Maricopa Cty.*, 410 P.2d 502 (Ariz. 1966); *State* v. *Moser*, 111 P.3d 54 (Haw. Ct. App. 2005); *People* v. *Meyerowitz*, 355 N.E.2d 1 (Ill. 1975); *People* v. *Nance*, 542 N.W.2d 358 (Mich. 1995); *Wood* v. *State*, 999 N.E.2d 1054 (Ind. Ct. App. 2013); *Toth* v. *State*,

901 A.2d 820 (Md. 2006); *State* v. *Wilbur*, 450 S.W.2d 458 (Mo. Ct. App. 1970); *State* v. *Gallagher*, 955 P.2d 1371 (Mont. 1998); *Scott* v. *Jones*, 84 N.W. 479 (N.D. 1900); *Berea* v. *Moorer*, 55 N.E.3d 1186 (Ohio 2016); *State* v. *Piekkola*, 241 N.W.2d 563 (S.D. 1976) (overruled on other grounds by *Matter of Estate of Erdmann*, 447 N.W.2d 356 (S.D. 1989)).[3]

Federal courts apply the same rule. *United States* v. *Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) (holding that "[j]ust as the imposition of a fine is an incident of a criminal conviction, so is the direction for repayment an incident to the vacating and setting aside of the conviction"); *Telink, Inc.* v. *United States*, 24 F.3d 42, 47 (9th Cir. 1994) (stating that if the defendants "prevail in setting aside their convictions, the wrongly paid fines would be automatically refunded, without requiring a civil action").

Another 13 States have codified this principle by statute. For example, South Carolina law provides: "When the judgment is reversed or modified the appellate court may make complete restitution of all property and rights lost by the erroneous judgment." S.C. Code Ann. § 18-1-140. See also Ark. Code Ann. § 16-96-509; Cal. Penal Code § 1262; Del. Code tit. 11 § 4103(a); Miss. Code § 99-19-73(12); N.J. Stat. Ann. § 2A:166-13, as interpreted by *State* v. *Perwin*, 342 A.2d 178, 180 (1975); N.Y. Penal Law § 60.35(4); Me.

---

[3] Remarkably, Colorado had adhered to this principle prior to the decision below. In 1961, the Colorado Supreme Court held—upon invalidating a criminal conviction—that "pending such further proceedings the parties be placed in status quo by refund to the defendant of the sums paid as fine and costs." *Toland* v. *Strohl*, 147 Colo. 577, 586, 364 P.2d 588, 593 (1961); accord *People* v. *Noel*, 134 P.3d 484 (Colo. App. 2005).

Rev. Stat. tit. 17-A § 1303-A; Pa. R.A.P. 2591, as interpreted by *Com.* v. *McKee*, 38 A.3d 879 (2012); 12 R.I. Gen. Laws Ann. § 12-22-14; Tex. Code Crim. Proc. art. 103.008; Utah R. Crim. P. 28; Wash. R. App. P. 12.8; Wash. Rev. Code Ann. § 10.01.160; Wyo. Stat. Ann. § 7-1-103.

Others have taken a different route, choosing instead to minimize the payment of exactions based on subsequently-invalidated convictions by staying fines, fees, and costs when an appeal has been filed. See, *e.g.*, Ky. RCr 12.76; Mass. R. Crim. P. 31; Md. Code Ann., Crim. Proc. § 11-613; Mont. Code Ann. § 46-20-204; Mont. Code Ann. § 46-20-707; Nev. Rev. Stat. Ann. § 177.115; S.D. Codified Laws § 23A-33-4; W. Va. Code Ann. § 62-7-1.

And many States have extended this principle beyond the financial exactions attendant to a criminal conviction. Convictions today can produce myriad collateral consequences, ranging from ineligibility for public housing to inability to purchase a firearm. See American Bar Association, National Inventory of Collateral Consequences of Conviction, perma.cc/-APU3-JDWV. Many States provide for automatic, or virtually automatic, reversal of these other collateral consequences upon the invalidation of a conviction that was the basis for imposing those consequences. For instance, States have enacted statutes providing for voter re-enfranchisement,[4] the expunction or sealing of

---

[4] Almost all States provide for automatic voter re-enfranchisement on release from prison or discharge of sentence. See Ark. Const. art. III, § 2; Colo. Const. art. VII, § 10; Del. Const. art. V, § 2; Ga. Const. art. II, § 1, para. III; Idaho Const. art. VI, § 3; Kan. Const. art. V, § 2; Tex. Const. art. VI, § 1; Alaska Stat. Ann. § 12.55.185; Conn. Gen. Stat. Ann. § 9-46a; Haw. Rev. Stat. Ann.

criminal records,[5] and relief from sex offender registration requirements.[6]

---

§ 831-2; Ill. Comp. Stat. Ann. 5/5-5-5; Ind. Code Ann. § 3-7-13-5; La. Stat. Ann. § 18:102; 730 Md. Code Ann. Elec. Law § 3-102; Mass. Gen. Laws Ann. ch. 51, § 1; Mich. Comp. Laws Ann. § 168.758b; Minn. Stat. Ann. § 609.165; Mo. Ann. Stat. § 561.026; Mont. Code Ann. § 46-18-801; Nev. Rev. Stat. Ann. § 213.157; N.H. Rev. Stat. Ann. § 607-A:2; N.J. Stat. Ann. § 19:4-1; N.M. Stat. Ann. § 31-13-1; N.Y. Elec. Law § 5-106; N.D. Cent. Code Ann. § 12.1-33-03; Ohio Rev. Code Ann. § 2961.01; Okla. Stat. Ann. tit. 26, § 4-101; Or. Rev. Stat. Ann. § 137.281; S.C. Code Ann. § 7-5-120; 17 R.I. Gen. Laws Ann. § 17-9.2-3; S.D. Codified Laws § 12-4-18; Tenn. Code Ann. § 2-2-139 (other provisions in the act held unconstitutional); Utah Code Ann. § 20A-2-101.5; Va. Code Ann. § 53.1-231.2; Wis. Stat. Ann. § 304.078.

[5] At least twelve States have enacted statutes providing for the expunction or sealing of criminal records. See Fla. Stat. Ann. § 943.059 (West 2016); Ala. Admin. Code r. 660-5-34-.09 (2016); Admin. Code r. 11.10.02.021; Ill. Admin. Code tit. 20, § 1285.70 ; Iowa Admin. Code r. 661-83.5(692A); Kan. Admin. Regs. 30-46-17; Miss. Admin. Code 31-2:6.1; 14B N.C. Admin. Code 18B.0501; N.D. Admin. Code 10-13-11-01; 234 Pa. Code § 320; S.C. Code Ann. Regs. 73-26 ; Tenn. Comp. R. & Regs. 1395-01-01-.07; Wash. Admin. Code 446-16-025. For a more exhaustive list, see Thomson Reuters, *Expungement of Criminal Records*, 0030 Surveys 20 (October 2015).

[6] Sex offenders can obtain relief from registration requirements in at least thirteen states when a conviction is reversed. See Colo. Rev. Stat. Ann. § 16-22-113; D.C. Code Ann. § 22-4001; Kan. Stat. Ann. § 22-4902; Me. Rev. Stat. tit. 34-A, § 11225-A; Miss. Code Ann. § 45-33-47 ; Mo. Ann. Stat. § 589.400(3); Mont. Code Ann. § 46-23-510; N.Y. Correct. Law § 168-f; N.C. Gen. Stat. Ann. § 14-208.6C; Or. Rev. Stat. Ann. § 163A.015; S.C. Code Ann. § 23-3-430; Ark. Admin. Code 004.00.3-39; 19 Va. Admin. Code 30-170-30. In at least one State, Connecticut, individuals with pending appeals are not considered to have a conviction for the purposes of sex offender registration requirements, mitigating the need for termination. See Conn. Gen. Stat. Ann. § 54-250.

The States' broad commitment to restoring a defendant to the status quo ante upon invalidation of a conviction reaffirms the longstanding norm that "when judgment, pronounced upon conviction, is falsified or reversed, * * * the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates * * *." 4 William Blackstone, *Commentaries* *386.

4. Colorado's deviation from these longstanding principles violates due process.

The foregoing history is dispositive of the due process inquiry. In *Medina*, the Court examined the "historical treatment of the burden of proof in competency proceedings." 505 U.S. at 446. Citing Blackstone and Hale, the Court concluded that "[t]he rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." *Ibid.*

In *Patterson*, by contrast, the Court found that New York could require a defendant to carry the burden of proof of severe emotional disturbance in a murder trial because "at common law" that burden historically "rested on the defendant." *Patterson* v. *New York*, 432 U.S. 197, 202 (1977). And in *Leland*, this Court held that the burden of proof as to an insanity plea could be placed upon the defendant. History was dispositive: "In all English-speaking courts, the accused is obliged to introduce proof if he would overcome the presumption of sanity." *Leland* v. *Oregon*, 343 U.S. 790, 799 (1952).

History is equally dispositive in this case. The principle that financial exactions attendant to a criminal conviction must be restored to the defendant when the conviction is invalidated has roots at least as deep as those protecting the insane against trial. Blackstone

and Hale recognized this principle, and it dates back to more than three hundred years before Blackstone.

Similarly ancient is the idea that defendants in such situations need not prove their innocence; reversal itself is all that was required for restoration to the status quo ante. The burden of proof was never an issue, because there was nothing to prove (except the reversal of the judgment itself). At the time the States ratified the Fourteenth Amendment, the States and the federal government applied this principle and imposed minimal, if any, processes upon defendants seeking restoration.

Colorado's Exoneration Act thus "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Medina*, 505 U.S. at 445)—the right to automatic or near-automatic restoration of a financial exaction upon reversal of the conviction supporting the exaction.

B. Under the decision below, criminal defendants whose convictions are reversed would be in a worse position than taxpayers subjected to an unlawful tax.

1. This Court has long recognized that taxpayers have a due process right to a "clear and certain" refund of improperly collected taxes. "[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930). When a taxpayer pursues a preserved claim, "due process requires a 'clear and certain' remedy for obtaining a refund." *Reich v. Collins*, 513 U.S. 106, 108 (1994) (quoting *Atchison, Topeka & Santa Fe R. Co.* v. *O'Connor*, 223 U.S. 280, 285 (1912)); see also *McKesson*

Corp. v. *Division of Alcoholic Beverages*, 496 U.S. 18, 22 (1990).

The Colorado Exoneration Act puts defendants subjected to an invalid criminal conviction in a worse position than taxpayers subjected to an unlawful tax. This is further evidence of the violation of due process."[I]f a [state] obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Ward* v. *Bd. of Cty. Comm'rs*, 253 U.S. 17, 24 (1920) (quoting *Marsh* v. *Fulton Cty.*, 10 Wall. 676, 684 (1870)).

Colorado asserts that "a tax that is prohibited by the Constitution is very different from a restitution order under a conviction—after the full protections of trial—that is reversed on appeal." Br. in Opp. 22. It argues that "[c]onvictions may be reversed for any number of reasons, ranging from actual innocence, to constitutional error, to lawyer or jury misconduct, to technical legal errors at trial." *Ibid.* But the same is true of taxes—there are a variety of grounds for invalidating them.

The critical facts are the same: If the basis for imposing the tax (the statute) is subsequently invalidated, the tax collected on its authority must be returned. When the basis for exacting funds was a conviction, the subsequent invalidation of the conviction should have at least the same effect. After all, due process does not permit the collection of a criminal fine on the basis that the defendant is unable to prove his *innocence*; on the contrary, it is for the state to prove *guilt*. Why shouldn't the same standard apply in reverse following appellate reversal?

Moreover, there is no rational justification for requiring the return of an invalid tax exaction, but permitting retention of an exaction imposed on the

basis of an invalid criminal judgment. The Constitution provides *greater* procedural protections to criminal defendants, not lesser ones. Whereas "[i]n the administration of criminal justice, the Due Process Clause [requires] that the state prove the guilt of an accused beyond a reasonable doubt," the "plaintiff's burden of proof [in civil suits] is a mere preponderance of the evidence." *Addington* v. *Texas*, 441 U.S. 418, 423–24 (1979). In sum, Colorado's attempts to distinguish taxes from conviction penalties are baseless.

2. The same result is compelled by the *Matthews* balancing test, which requires

> consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 334–35 (1976).

Petitioners' brief explains why *Mathews* bars the additional procedural burdens imposed by the Colorado statute. Pet. Br. 22-23.

It is similarly clear that, under *Mathews*, criminal defendants whose convictions have been invalidated have a strong claim that substantive procedural hurdles cannot be imposed on the return of monetary exactions awarded on the basis of invalidated convictions.

First, criminal defendants have a stronger private interest than taxpayers because of the stigma associated with any penalty or payment triggered by a criminal conviction.

Second, there is a clear risk of erroneous deprivation: The State is permitted to retain funds when the basis for exacting them—the imposition of a conviction—no longer exists. Without a valid conviction, there is no statutory basis for an exaction at all. On the other hand, tax refund cases often involve complicated factual disputes that pose far less risk of erroneous deprivation.

Third, the government has a much greater interest in the collection of taxes than in the collection of criminal fines, which constitute a *de minimis* part of the state budget. A jury's guilty verdict alone does not create any government interest in collecting criminal fines, unless that verdict was lawfully obtained. States like Colorado tacitly admit this by declining to impose criminal fines when a trial judge rejects a jury's guilty verdict as contrary to the evidence. Further weakening any claimed state interest in monetary penalties, Colorado only imposes the additional procedures set forth in the Colorado Exoneration Act when the defendant is sentenced to a term of incarceration. Tax law cases, conversely, have acknowledged the weighty interests of the government in collecting taxes. See, *e.g.*, *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 103, 115-117 (1981) (recognizing that federal courts cannot enjoin state tax collection if a "plain, speedy, and efficient" remedy is available in state court, citing 28 U.S.C. § 1341); see also *Am. Trucking Associations, Inc.* v. *Smith*, 496 U.S. 167 (1990).

All three elements of the *Mathews* balancing test point toward the same conclusion: Petitioners are due

more favorable, not less favorable, process than are taxpayers. But Colorado's statute instead subjects them to more onerous procedural requirements in attempting to recover exactions based on subsequently invalidated convictions. That makes no sense.

C. The Colorado law's imposition of different procedural burdens on similarly-situated defendants confirms its unconstitutionality.

The Colorado statute's unconstitutionality is further confirmed by its differential treatment of similarly situated criminal defendants. Differential treatment not only undermines any argument by Colorado that substantial state interests justify the procedural burdens imposed by the State's law, but it also provides a strong basis for concluding that the Act violates the Equal Protection Clause.

First, this Court in *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966), held unconstitutional a state law that differentiated between defendants based on whether or not they had been subjected to "a term of incarceration." Colorado's Exoneration Act appears to draw precisely the same distinction.

Rinaldi involved a New Jersey law that required convicted defendants to pay the cost of unsuccessful appeals—but only if they were in prison. Defendants who were not in prison—*i.e.* those with suspended sentences or whose sentences were limited to monetary penalties—were not subject to the payment obligation. The Court held that distinction unconstitutional. "[T]he law fastens the duty of repayment only upon a single class of unsuccessful appellants—those who are confined in institutions. We find that the discriminatory classification imposed by this law violates the

requirements of the Equal Protection Clause." *Id.* at 308 (footnote omitted).

Like the provision at issue in *Rinaldi*, the Act applies only to defendants who were "sentenced to a term of incarceration * * * and [have] served all or part of such sentence." Colo. Rev. Stat. § 13-65-102(1)(a). The decision below thus suggests that defendants not subject to incarceration would simply be out of luck, without recourse to any "procedure for seeking a refund." Pet. App. 19a.

This distinction violates the holding in *Rinaldi*. Criminal defendants cannot be treated differently with respect to financial exactions based on whether one received a sentence of incarceration and the other did not. *Rinaldi*, 384 U.S. at 308.

Second, the Colorado statute distinguishes among defendants depending on the stage of proceedings at which a jury verdict of guilt is set aside. Under Rule 29(c) of the Colorado Rules of Criminal Procedure, a judge can issue a judgment of acquittal after a jury verdict of guilt if the evidence is insufficient to sustain a conviction. In that instance, the defendant would not pay any criminal penalties.

But consider another defendant whose conviction is vacated on appeal based on insufficient evidence—the very same standard. That person would have to prove actual innocence in order to obtain a refund of the monetary exactions.

In both cases the State failed to provide sufficient evidence to meet its burden of proof, but in only one case did the defendant have to prove her innocence to keep her money. That distinction is unjustifiable and unconstitutional.

CONCLUSION

The judgments of the Colorado Supreme Court should be reversed.

Respectfully submitted.

BARBARA BERGMAN
NACDL Amicus
Committee Co-Chair
James E. Rogers
College of Law
The University of Arizona
1201 E. Speedway Blvd
P.O. Box 210176
Tucson, AZ 85721-0176
(520) 621-3984

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

---

* The representation of *amicus* by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.